

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 120 of 1979

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KACHCHH WAKF BOARD

Versus

KACHCHH MEMON JAMAT

Appearance:

MR S.M. SHAH FOR MR CH VORA for Petitioners

MR P.C. KAVINA FOR MR PM THAKKAR for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA.

Date of decision: /12/97

JUDGEMENT

1. This Second Appeal is by two of the defendants Nos. 1 and 2 in original Civil Suit No. 237 of 1970, in the Court of Joint Civil Judge, Bhuj Kutch, against the judgment and decree dated 15.10.1978 passed by Extra Assistant Judge, Kutch in Civil Regular Appeal No. 176 of 1974 affirming the judgment and decree passed by Joint

Civil Judge Bhuj-Kutchchh, on 18.11.1974. The appellants are Kutch Wakf Board through its Secretary, Kutch Muslim and Education Welfare Society, a Wakf registered under the Wakf Act, 1954.

2. The facts leading to the present appeal are that respondents Nos. 2 and 3 - Sadhu Nandram Govindram and Thacker Purshottam Ganesh filed a suit as the representative suit under Order I, Rule 8 for the following reliefs:

"(i) That it be declared that above mentioned suit property bearing Survey No. 917 of Bhuj shown as Karimdina alia Kamu Suleman Musafarkhana mentioned in the supplementary list of Wakfs of Kutch at Serial No. 2 in the Gujarat Government Gazette dated 6.5.1965 at page 614, is not a Wakf property and ordered to be deleted from the list of Wakfs as published on 6.5.1965 and further:

(ii) To restrain def. Nos. 1 to 3 or their agents or servants from damaging, demolishing, constructing or altering the structure on the disputed land and also to restrain the defendants or their agents or servants from prohibiting plaintiffs or member of general public of any community, caste or creed from using the said property or land as Dharmashala lead to grant a perpetual injunction in legal form for the same and further:

(iii) To declare that the said transfer by defendant No.3 to defendant No.2 by way of gift deed dated 16.9.1968 is not legal and void."

2. According to the assertions in the plaint, the original land bearing survey No. 917 was granted by then Maharao of Kutch, the Ex-Ruler, a Native State of Kutch under the Chhapa Lekh of Samvat year 1930 corresponding to March 1874 to one Memon Shaikh Karim bin S. Nani for the purpose of construction and to use the same as Darmashala for the use and benefit of public by and large without any reservation of any cast, creed or colour. On some of the portion of this land, some building structure was constructed and was used as Dharmashala by the general public at large without any reservation of caste, creed or colour. From the very beginning the nature of the property is the public trust property and from its inception it was not intended to be Wakf property and the provisions of Wakf Act, 1954 do not apply to this property. Under the provisions of Wakf Act, the Kutch

Wakf Board published in the Government Gazette the list of Wakf properties as were existing on the commencement of the Act, 1954 in the district of Kutch on 16.7.1964. In the said list, the aforesaid property was not shown as Wakf property. However, afterwards supplementary list of Wakf properties was published on 6.5.1965 in Government Gazette in which it was shown as Haji Karim dina @ Kalu Suleman Musafir Khana as the Wakf property belonging to the defendant No.3 Kachhi Memon Zamat. The property was since inception was being used as Dharmashala but subsequently defendants Nos. 1 to 3 in collusion have changed the use of the said property and have illegally and fraudulently got suit property listed in the Wakf property. It was also pleaded that the defendant No.3 Kachhi Memon Zamat, a registered Wakf has transferred the suit property to defendant No.2 - Kutch Muslim Education and Welfare Society, another registered Wakf by a gift document dated 16.9.1968, which is illegal, void, fraudulent and without any authority. it was also pleaded that defendant No.2 is trying to demolish the building, structure of Dharmashala and wants to construct Muslim hostel for the exclusive use of Muslim students on the suit land which they have no right to use. In the aforesaid circumstances, plaintiffs averred that if defendants are allowed to change the user, plaintiffs' right to have access to the building Dharmashala for accommodation as a citizen would be infringed. Therefore, the plaintiffs had to file the suit for a declaration that the above mentioned property is not a Wakf property for the grant of permanent injunction restraining the defendants Nos. 1 to 3 or their agents or servants from damaging or constructing or changing or altering any construction on the suit property and also restraining the defendants or public at large to use the disputed property and the premises as Dharmashala.

3. Written statement was filed by defendant No.2 and present appellant No. 2 which was adopted by defendant Appellant No.1, the Kutch Wakf Board. According to the written statement the suit land was of the exclusive ownership of Shaikh Karim Din Suleman but the plea about the building or the property being used as Dharmashala was denied. It was asserted that the property was exclusively used by Muslims as Musafirkhana and was not available to be used by members of public at large. It was also denied that the property in question is a public trust property. It was asserted that property has rightly been declared as a Wakf property. It was pleaded that the property was dedicated as a Wakf property by Shaikh Karim after receiving grant from State which has been constructed by Shaikh Karim and since its

construction being used by Muslims as Musafirkhana. It is not used as a public utility open for all public. Apart from denying the plaintiff's claim on merit, the defendants also pleaded that the plaintiff has no locus standi to bring this suit because plaintiffs are not Muslims and have no interest in the property in question which is a Wakf property and it was also pleaded that the plaint squarely raises a question whether the suit property is a public trust or a Wakf property, a question exclusively triable by authorities under the Bombay Public Trust Act and Civil Court has no jurisdiction to try the issue, without which plaintiffs' right to relief cannot be determined. As many as sixteen issues have been framed. Two additional issues have also been framed. The issues framed are as under:

- "1. Whether this Court has jurisdiction to hear this suit?
2. Whether the suit is on proper court fee stamp?
3. Whether the suit is in time?
4. Whether the plffs. have no right to file this suit?
- 4A. Whether the application of the Wakf Act, 1954 to the District of Kutch is discriminatory, invalid, unconstitutional and ultravires after the application of the Bombay Public Trust Act, 1950 to the District of Kutch on 1.8.1961 and as such whether it creates discrimination and inequality before the law and violates the provisions of Art. 14 and 19 of the Constitution of India?
5. Whether the suit is bad for non joinder of necessary parties as contended?
6. Whether the State Government is necessary party to this suit as contended? If yes, what is the effect of nonjoinder?
7. Whether the plaintiffs prove that the suit property was granted by Maharao of Kutch to Karimdina Suleman for the purpose of construction of Dharmshala as alleged?
8. If yes, whether the plaintiffs prove that the Dharmshala was for benefit and was to be used by public at large without any reservation of any

caste, creed or colour as alleged?

9. Whether the plaintiffs prove that the suit property is a public trust property as alleged?
- 9A. Whether defendant No.2 proves that Seth Karimuddin Suleman had any legal right to create Wakf as contended by him?
10. Whether the defendant Nos. 1 and 2 prove that the suit property is a Wakf property as contended?
11. Whether the plaintiffs prove that the supplementary list of Wakf properties dated 6.565 is invalid, inoperative, and without jurisdiction as alleged?
12. Whether the plaintiffs prove that the transfer of the suit property by the defendant NO.3 to the defendant No.2 is illegal, invalid, fraudulent and without authority as alleged.?
13. Whether the defendant No.2 proves that he has right to change the use of the suit property as contended?
14. Whether the plaintiffs are entitled to declaration as prayed for?
15. Whether the plaintiffs are entitled to permanent injunction as prayed for?"

Except Issues Nos. 4A, 9, 9A and 11, all issues were decided in favour of the plaintiff. Issue No.4A was decided against the plaintiff. Issue No. 9 was not decided as civil court had no jurisdiction to decide it. Issues No. 9A and 11 were decided against the plaintiff. The court came to the conclusion that the plaintiff has locus standi to maintain the suit and the court has jurisdiction to try the suit. In view of its findings that plaintiff has proved that suit property was granted by Maharao of Kutch for the purpose of construction of Dharmashala and the building was used by public by and large as Dharmashala without any reservation of any caste, colour or creed; defendants have failed to prove that Karim Suleman had any legal right as prayed and contended by him, defendants have failed to prove that suit property are Wakf properties as contended; and as a consequence thereof, the transfer of suit property between defendant No. 2 and 3 and change of user of

property by defendant No. 2 is also illegal, decree as prayed for by the plaintiff was granted. On appeal, the appellate court affirmed the decree. Hence this appeal.

4. The following questions of law were framed at the time of admitting the appeal by this Court:

"1. Whether 'Lekh' Exh. 96 executed by Kutch State in favour of Karimuddin in 1874 granted the land to the grantee absolutely or whether it was a grant only for a public purpose.

2. Whether Government Notification Exh.133 is invalid and without authority.

3. Whether the transfer by defendant No.3 to defendant No.2 is valid.

4. Whether from the facts and circumstances proved in the case, Wakf by user is established.

5. Whether the State of Gujarat was a necessary party to the suit"

6. During the pendency of this appeal one of the original plaintiff respondent No.2 had died. However, both the learned counsel state that since suit was filed by two plaintiffs as representative suit under Order I, Rule 8, with the leave of Court, heirs of the estate of deceased are not required to be brought on record, and so long as one of the plaintiff is on record, the death of the other suitor shall not affect the present appeal, and fresh public notice inviting representation is not required to be issued. The appeal be heard and decided on merit.

7. In the first instance it was urged that the suit has been filed under Section 6 of the Wakf Act, 1954. The plaintiffs, who deny the existence of Wakf itself cannot be treated as persons interested in Wakf, which is necessary for locus standi of plaintiffs to maintain the suit. Thus the suit at the instance of plaintiffs is not maintainable. Reliance was placed on Board of Muslim Wakfs, Rajasthan vs. Radhakishan AIR 1979 SC 289. (Herein after referred to as Radhakishan's case).

8. To appreciate the contention it will be apposite to notice the provisions of Section 6 more particularly subsection (1) of the Act of 1954.

"Disputes regarding wakfs. - (1) If any question arises whether a particular property specified as wakf property in a list of wakfs published under sub-section (2) of Section 5 is wakf property or not whether a wakf specified in such list is a Shia wakf or Sunni wakf the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a civil court of competent jurisdiction for the decision of the question and the decision of the civil court in respect of such matter shall be final:

Provided that no such suit shall be entertained by the civil court after the expiry of one year from the date of the publication of the list of wakfs under sub-section (2) of Section 5:

Provided further that in the case of the list of wakfs relating to any part of the State and published or purporting to have been published before the commencement of the Wakf (Amendment) Act, 1969 (38 of 1969), such suit may be entertained by the civil court within the period of one year from such commencement.

Explanation. - For the purposes of this section and Section 6-A, the expression "any person interested therein", occurring in sub-section (1) of this section and in sub-section (1) of Section 6-A, shall, in relation to any property specified as wakf property in a list of wakfs published, under sub-section (2) of Section 5, after the commencement of the Wakf (Amendment) Act, 1984, shall include also every person who, though not interested in the wakf concerned, is interested in such property and to whom a reasonable opportunity had been afforded to represent his case by notice served on him in that behalf during the course of the relevant inquiry under Section 4.

(2) Notwithstanding anything contained in sub-section (1), no proceeding under this Act in respect of any wakf shall be stayed by reason only of the pendency of any such suit or of any appeal or other proceeding arising out of such suit.

(3) The Survey Commissioner shall not be

made a party to any suit under sub-section (1) and no suit, prosecution or other legal proceeding shall lie against him in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules made thereunder.

(4) The list of wakfs published under sub-section 5 shall, unless it is modified in pursuance of a decision of the civil court under sub-section (1) be final and conclusive.

(5) On and from the commencement of the Wakf (Amendment) Act, 1984 in a State, no suit or other legal proceeding shall be instituted or commenced in a civil court in that State in relation to any question referred to in sub-section (1)."

9. The contention of appellants points out that modus and locus to challenge any entry in the list of Wakf properties published by the Board under Section 5(2) is prescribed by Section 6 and a suit to challenge such entry by an alien to class of suitors envisaged under Section 6 is not maintainable. On these premise the argument flourishes on the theme that locus to institute a suit for challenging entry in list published under Section 5(2) is conferred on Board or Mutawalli or 'a person interested therein'. The plaintiffs in the present lis do not unquestionably fall in first two classes. In order to maintain their suit under Section 6, they must conform to genre of 'person interested therein', the key expression 'therein' according to 'therein' according to learned counsel refers to interest in the 'Wakf' and not to interest in the property of Wakf as held in Radha Kishan's case (supra). The Explanation which was brought to get over the effect of said decision vide Wakf (Amendment) Act 1984 does not alter the position as that amendment was never brought into enforcement. Read in the background of provision and in the light of apex court pronouncement leaves no room for doubt that Section 6 is not exhaustive providing complete code of remedies to affected interest in all circumstances. It rather confines the maintainability of suit by three classes of persons mentioned in the provision to be within specified period of limitation for the one year and not beyond. But interests of other than those classes of persons, if adversely affected by such publication, their remedies remain untrammelled and uncurtailed as are available under general law. The

provision prescribes mode and period of limitation for the Board, Mutawalli or person interested in Wakf to challenge correctness of such entries, by way of instituting civil suit within a period of one year from the date of publication of such list of Wakf properties or within one year of commencement of Wakfs (Amendment) Act, 1969, if such list is published prior to that.

10. While declaring that 'person interested therein' in Section 6(1) must refer to Wakf, the word that immediately precedes it and not to 'Wakf property', the apex court also clarified the confines within which Section 6(1) and conclusiveness of list published under Section 5(2) operates under Section 6(4) of the Act. The true ambit and scope of Section 6 was thus stated by the Court:

"The word 'therein' must necessarily refer to the 'Wakf' which immediately precedes it. It cannot refer to the 'Wakf property'. Sub section (1) of Section 6 enumerates the persons who can file suits and also the question in respect of which such suits can be filed. In enumerating the persons who can file suits under this provision, only the Board, the Mutwalli of the Wakf and 'any person interested therein', thereby necessarily meaning any person interested in the Wakf are listed. It should be borne in mind that the Act deals with Wakfs, its institutions and its properties. It would therefore be logical and reasonable to infer that its provision empowers only those who are interested in the Wakf to institute suits."

11. Having explained thus far, the principle on which learned counsel for the appellant relies, the apex court spoke further about the confines of the provision keeping intact the protection of law to those who fell outside such confines:

"The words 'any person interested therein' appear soon after 'the Mutwalli of the Wakf' and therefore the words 'therein' has been used to avoid repetition of words 'interested in the Wakf'. The purpose of Section 6 is to confine the dispute between the Wakf Board, the Mutwalli and a person interested in the Wakf."

12. The Court went on to approve the following reasoning of High Court:

"The very object of the Wakf Act is to provide better administration and supervision of Wakfs and the Board has been given powers of superintendence over all Wakfs which vest in the Board. This provision seems to have been made in order to avoid prolongation of triangular disputes between the Wakf Board, the Mutwalli and a person interested in the Wakf who should be person of same community. It could never have been intention of the legislature to cast a cloud on the right, title or interest of persons who are not muslims. That is if a person is, he be a Christian, a Hindu, a Sikh, a Parsi or any other religious denomination and if he is in possession of a certain property, his right, title and interest cannot be put in jeopardy simply because that property is included in the list published under subsection (2) of Section 5.

.....

Similarly, the legislature could not have meant to curtail the period of limitation available to him under the Limitation Act and to provide that he must file a suit within one year or the list would be final and conclusive against him. In our opinion, subsection (4) makes the list final and conclusive only between the Wakf Board, the Mutwalli and the person interested in the Wakf as defined in Section 3 and no other person"

13. Approving the above reasoning of Rajasthan High Court in AIR 1967 Raj 1, the Court concluded:

"It follows that where a stranger who is non Muslim and is in possession of a certain property, his right, title and interest therein cannot be put in jeopardy merely because the property is included in the list. Such a person is not required to file a suit for a declaration of his title within a period of a year. The special rule of limitation laid down in proviso to subsection (1) of Section 6 is not applicable to him. In other words the list published by Board of Wakfs under subsection (2) of Section 5 can be challenged by him by filing a suit for declaration of his title even after the expiry of the period of one year, if necessity of filing such suit arises."

14. The above declaration of law by the apex court put it beyond pale of doubt that a suit by a non Muslim to protect his rights in any property from being affected by publication of list of Wakfs under Section 5(2) is not hit by Section 6(1) either on the issue of locus or special period of limitation, nor finality and conclusiveness of such publication under Section 6(4) clouds his rights.

15. Viewed in this perspective, I have no hesitation in rejecting the first contention of appellants. The maintainability of representative suit by two non muslims to seek protection of their rights as member of public in the said property denying the existence of Wakf is not affected by Section 6, subject of course to other provisions of law. Even otherwise assuming the appellants to be governed by Section 6 for the sake of argument, the present suit having been filed within one year of commencement of Wakfs (Amendment) Act 1969 in respect of list published under Section 5(2) prior to such commencement, the suit is not barred even by special rule of limitation provided in proviso to Section 6(1).

16. This leads to next contention raised by Mr. Shah, learned counsel for the appellants. It was urged that since the foundation of plaintiffs claim is existence of a Dharmshala as a public Trust, to which every member of public has a right to free access to seek abode raises a question between the parties whether there exist a public charitable trust. It is not in dispute that the said property is not registered as public Trust under Bombay Public Trust Act that is to say no enquiry to that effect has been held by authorities under Bombay Public Trusts Act, 1950 (hereinafter called as Act of 1950). Under Section 80 of the Act of 1950, jurisdiction of civil court is barred to decide or deal with any question which is by or under the Act of 1950 is to be decided or dealt with by any officer or authority under the Act or in respect of which the decision or order of such officer or authority has been made final and conclusive. Under Section 79, question whether there exist a trust or not, and whether such Trust is a public trust or a property is of such public trust is to be decided by the Deputy or Asst. Charity Commissioner or the Charity Commissioner in appeal as provided by the Act. The decision of Deputy Commissioner or Asst. Charity Commissioner or Charity Commissioner in appeal as the case may be is final and conclusive unless such finding is set aside by a civil court on application or by High Court in appeal.

17. In fact issue No. 9 was framed to that effect whether the plaintiff proves that the suit property is a public trust property as alleged. The issue was left undecided by courts below on the anvil that it fell beyond its jurisdiction with reference to aforesaid provisions of the Act of 1950. Learned Counsel contends that issue No. 9 was pivotal issue in the suit and without its decision suit, could not have proceeded further, else suit must fail.

18. Mr. Kavina, learned counsel for the plaintiffs respondents urged that a declaration to the effect that suit property is not a Wakf property can be granted without determining the issue about existence of a public trust to which the suit property belongs. He went on to contend that suit is merely for declaration of publication of list under Section 5(2) of the Act of 1954 and not for declaration of plaintiff's right, and relief if any to that effect need not necessarily be decided for the present suit. It was also urged relying on Section 87 of the Act of 1950 that no provision of Bombay Public Trust Act, 1950 applies to Wakfs in Kutch to which Bombay Public Trust Act 1950 was made applicable vide notification dated 4th January 1955, and which formed part of Maharashtra State as a result of States Reorganisation Act, 1956 and continues to be so until Gujarat State was formed in 1960, under Bombay (Reorganisation) Act, 1960.

19. Having carefully considered rival contention I find force in contention of learned counsel for the appellant.

20. This cannot be disputed and doubted from the pleadings in plaint that foundation of plaintiffs right is existence of Dharmshala as public Trust to which every member of public, without distinction of caste, colour, creed or object of visit has a right to seek accommodation. It is this right breach of which is alleged by the impugned action under Wakf Act, 1954 by the Board of Wakfs in publishing the list of Wakfs vide supplementary list dated 6.5.1965. Thus establishing the existence of Dharmshala as public Trust to which plaintiff or public at large has unobstructed right of access was the prime-essential for the plaintiffs, on which alone their claim to relief can be sustained. Without establishing such right issue about relief to declare negatively that the property in question is not a Wakf property is declaration in vacuum without reference to right of the plaintiff to seek that remedy. Without establishing the basic facts of their right, the

plaintiffs will lose their locus standi to claim remedy. It is well settled that plaintiff must succeed on his own case. He cannot succeed on defendants failure to establish his defence, before he proves his case.

21. One cannot fail to take notice that it is essential before a court entertains a plaint for trial, it must satisfy itself that it discloses cause of action to plaintiffs, to file the suit. Cause of action, whether taken in narrow sense or wider sense, does involve circumstances forming infraction of a right or immediate occasion for action. Though term cause of action has not been defined by statute, its meaning has come to be well established by judicial pronouncement. In the restricted sense it has been held to mean the circumstances forming the infringement of the right or immediate occasion for the action. In wider sense, it means bundle of facts raising necessary conditions for the maintenance of suit which include not only infraction of right but the infraction coupled with rights itself. But in either sense infraction of right is essential ingredient of cause of action. No suit can be said to be maintainable for a relief without relating to infraction or apprehended infraction of right of the suitor, whether personal or as a member of public. Otherwise it will be sheer academic declaration of a relief, without there being any occasion for the plaintiff to seek such relief. For example, a person, though not owner of a property whom he seeks a decree for injunction against someone restraining him from interfering with enjoyment of property, the inherent cause is that suitor seek to protect his possession, which he asserts to be with him, though he may not be owner of the property. Without claiming ownership he seeks to protect his right to remain in possession peacefully, unless evicted through due process, against unlawful infringement of his right where he is dispossessed and claims to be owner of property, he not only alleges infringement of his right but claim declaration of his right to property itself. But in either case, infringement of right becomes a necessary ingredient of cause of action.

22. The relevance of cause of action does not end at that viz. on making necessary averments. In effect cause of action compendiously mean every fact which it would be necessary for plaintiff to prove, if traversed in order to support his right to judgment of the courts. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.

23. In this connection reference may be made to State

of Madras v. C.P. Agencies AIR 1960 SC 1309. The Supreme Court quoted with approval opinion of Lord Watson in Chand Kaur v/s. Pratap Singh (1888) 15 Ind. Appeals 156:

"Now the cause of action has no relation whatever to defence which may be set up by defendants, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.

24. The Court approved the opinions of Lord Esher M.R. and Fry L.J. in Read vs. Brown (1888) 22 QBD 129. Lord Esher M.R. defined cause of action to mean:

"Every fact which it would be necessary for the plaintiff to prove, if traversed in order to support his right to judgment of the court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved."

Fry L.J. in agreement opined :

"Everything which if not proved, gives the defendant an immediate right to judgment must be part of the cause of action."

25. The meaning of cause of action thus understood takes within its ambit necessity of averments as to right of the plaintiff which is or apprehended to be infringed by the act of defendant giving occasion to the action and such averments if traversed by the defendant, become necessary to be proved by plaintiff before his right to claim relief gets considered.

26. Considered in this light if we examine the plaint, nature of right to which plaintiffs lay claim and which they allege has been infringed is that that from very beginning the nature of property is the public trust property' was fact pleaded in para 9. In para 7, it was averred that, "under the provisions of the Wakf Act the Kutch Wakf Board published in Gazette the list of Wakf properties as were existing on the date of commencement of the Act of 1954 in District of Kutch on 15.9.1964 and in the said list the property is not shown as the Wakf Property. The suit property was not declared as Wakf property in the said list because the defendants were

fully aware as to nature of the property being Public Trust Property."

27. In the context of above two averments two more averments may be noticed. In para 4 it was stated:

"That on some portion of this land ... some building structure was constructed and was used as Dharmshala by the general public at large without any reservation of caste or creed."

28. In para 16, it was averred 'that the plaintiffs as the members of general public are interested in the said suit property and therefore they are filing this suit for a declaration that the suit property listed in the supplementary list of 15.6.67 as Karimdina alias Kanu Suleman Musafirkhana is not Wakf property. The suit property could be classified as the Public Trust Property under the Bombay Public Trust Act or alternative it would be a Government Property'.

29. These averments lead to averment of infringement of right as under in para 18:

"That the plaintiff feel that if the defendants are allowed to construct a Muslim Hostel, then and thereby a change of user plaintiffs right to use the same as Dharmshala as a citizen of India would be infringed."

30. The above averment clearly reveals that plaintiffs suit is founded on infringement of their right to access to suit property as a member of general public on the basis that such property is property of public trust meant for public at large in contrast with a Wakf Musafirkhana meant for Muslims only. On the basis of principles viewed above in order that plaintiffs succeed to their claim to relief these facts establishing right of plaintiffs and its infringement is necessary before consideration of relief is undertaken. The fact that draftsman has deftly avoided claiming relief as to declaration of existence of Public Trust holding the property in question in trust for public use without reservation of caste or creed cannot be decisive. In the words of Lord Watson in Chand Kaur's case (supra) cause of action, which inheres facts revealing infringement of rights and require such facts to be necessarily proved before relief can be successfully claimed, does not depend upon character of relief prayed for by the plaintiff. It entirely refers to grounds set forth in the plaint upon which the plaintiff asks the court to

arrive at conclusions in his favour.

31. With these premise in focus further conclusion is not difficult to reach. The averments referred to above have been traversed. An issue to that effect has been raised as it arose out of pleadings. But, thereafter, courts below clearly fell in error when realising that the said issue about existence of a public Trust and the suit property being a property of such trust, having not already been determined, fell beyond their jurisdiction, to decide in view of clear provisions of Section 79 & 80 of Bombay Public Trust Act, and about which there is no dispute between the parties, they decided to abandon decision of that issue and proceed with the trial with reference to relief claimed by the plaintiff. In doing so both the courts below ignored the principle that unless facts constituting cause of action of plaintiff which include nature of right claimed by the plaintiffs and its infringement, no trial in respect of relief claimed simpliciter could have proceeded successfully. That would result in grant of relief without proof of facts necessary to be proved before plaintiff could succeed.

32. In this connection one also cannot fail to notice that in Radhakihan's case (AIR 1979 SC 289) while the apex court upheld the right of non muslims claiming rights of their own qua the property included in list of Wakf Properties published under Section 5(2) of the Wakf Act to file suit de hors Section 6 of the Act of 1954 under general law made it more than clear that such suits outside Section 6 must be for 'declaration of his (claimant to such right) title' as contradistinguished from mere declaring the published list to be illegal and void. Such declaration can only be ancilliary to declaration of claimant's title and not as a primary relief by itself as may be claimed by persons envisaged under Section 6 of the Act of 1954.

33. As I have upheld the contention that suit by plaintiffs is not covered by Section 6 of the Wakf Act, the relief as to declaring the publication of suit property as Wakf property as illegal and void not affecting the plaintiff rights and conclusiveness attached to such publication under Section 6(4) of the Act does not bind the plaintiff can only be ancillary to declaration of his title to right claimed. From the pleadings of plaintiffs as noticed above, such claim is clearly laid in the plaint. Clever drafting cannot successfully camouflage the real nature of suit as revealed from reading of the plaint as a whole.

34. If for the sake of arguments it is assumed that suit is not for such declaration of title, then too, on the basis of principle enunciated in Radha Kishan's case, the suit will not be maintainable.

35. Thus viewed from any angle the suit could not have proceeded further without determination of issue about existence of public trust holding property in question as Dharmshala open for public at large not amounting to a Muslim Wakf.

36. The contention of learned counsel for respondent that Section 87 of the Bombay Public Trust Act takes the Wakfs in the State to which Wakf Act applies beyond the operation of Bombay Public Trust Act 1950 on close scrutiny does not impress.

37. Section 87 of the Act of 1954 as introduced by Bombay Act No. 6 of 1960 w.e.f. 28.1.1960 reads as under:

"S.87. Nothing contained in this Act shall apply
to -

(a) those Wakfs in certain areas of the State
to which provisions of the Wakfs Act,
1954 (29 of 1954) have continued to
apply; or

(b) the Nanded Gurudwara, the administration
of which is governed by the Nanded Sikh
Gurudwara Sachkhand Shri Hazur
Apchalnagar Sahib Act, 1956 (Hyd Act No.
XXXVII of 1950)"

38. The Wakf Act, 1956 was applied to Kutch from 15.1.1955 and it continued to apply after it became part of Maharashtra on commencement of State Reorganizations Act, 1956 and so continued until 1.5.1960, when under Bombay Reorganisation Act, 1960 it became part of Gujarat on its formation.

39. However, the enquiry whether a Wakf exist and a particular property is Wakf property or not precedes application of Act of 1954 to such property. Until such state is reached, any enquiry which is necessary before the operation of Act of 1954 is attracted, is not envisaged to be excluded from the jurisdiction of such authorities as are competent to hold such enquiry. If for determining the question whether Wakf Act, 1954 operates in respect of property needs an enquiry into

question whether the property is a public trust, not falling into Wakf, the exclusive jurisdiction to decide such issue, before provisions of Wakf Act can be attracted vest in authorities under the Bombay Public Trust Act within the state of Maharashtra and Gujarat. In such cases first question that requires to be determined is whether there exist a public trust. Next question that require to be determined to be is whether it is a public trust in the nature of Wakf on determination of second question the operation of or exclusion of applicability of Bombay Public Trust Act may depend. What is primary enquiry and what is ancillary enquiry must further depend upon the nature of enquiry contemplated.

40. Where the primary question is determination of question whether it is a Wakf property and ancillary, question that is called upon to be decided is whether such Wakf is also a public trust, the answer may be different. But where primary question is whether the property is property of public trust and ancillary question may arise whether it is also a Muslim Wakf, the position may be different. This is best illustrated in facts of present case.

41. As has been seen above the cause of action which occasioned the filing of suits by the plaintiffs, in the sense infringement of rights of plaintiff which occasioned setting proceedings in motion for seeking relief is claim to free access to property as members of public without distinction of caste and creed on the assertion that it is property belonging to public trust. The further averments to act of infringement of this right by alleged assertions of defendant about its being a Muslim Wakf is in the realm of defence against such infringement. From the conclusion to which I have reached above, the fact necessary for plaintiff to prove for being successful in claiming relief is their right to free access to the property in question as public trust property. Unless that right is established further question of considering its infringement does not arise, unless the first premise is not disputed by the defendants. For the purpose of determining what facts are necessary for plaintiff to prove neither defence raised nor character of relief claimed is relevant. Applying the above stated test envisaged by Lord Esher M.R. in 15 I.A. 121 and Lord Watson in (1988) 22 QBD on traversing by the defendants the fact necessary for the plaintiff to prove is that property in question is a public trust property to which they have a right of free access uninhibited by caste or creed. Unless that

question is determined in favour of plaintiffs, the stage for considering defence does not arise. This is a stage before operation of Wakf Act can be said to be attracted excluding the operation of Bombay Public Trust Act.

42. Moreover, one important factor to be kept in view is that present is a suit falling between parties stranger to proceedings culminating in publication of list under Section 5(2) and beyond the scope of Section 6. To such suitor finality and conclusiveness of list under section 6(4) of the Act of 1954 does not apply as held by Supreme Court in Radha Kishan's case (AIR 1979 SC 289).

43. Thus suit by strangers for declaration of their right independent of persons envisaged under Section 6(1), where such right of suitor is founded on existence of property as public trust, the primary enquiry is whether there exist a public trust and whether the property in question is property of such public trust. This enquiry under Section 79 of the Act of 1950 is exclusively within the jurisdiction of authorities under the Bombay Public Trust Act, 1950. Such enquiry by civil court can only be in proceeding envisaged to be arising out of findings recorded by authorities under the Act and not otherwise. The position may be otherwise if right of suitor is not founded on existence of such property as public trust property but in personal capacity. In such latter cases, the question of existence of public trust does not arise at all. (The fact that a Wakf can also be a public trust at that stage is not of relevance).

44. In that view of the matter, the plea that Bombay Public Trust has no application to property in question cannot be sustained, as it is founded on assuming a finding in favour of defendant that property is a Wakf property situated in area to which Wakf Act, 1954 applies. It is not enough to show that Wakf Act, 1954 was extended to Kutch at relevant time. Before exclusory provision of Section 87 is attracted, it must further be established that property is Wakf property to which the Wakf Act applies. The latter question in the nature of suit at hand being ancillary to main question to be established by plaintiff as to nature of property as Public Trust property, ancillary question cannot be determined first, particularly in view of the pleadings of the parties. Both parties have pleaded existence of Public Trust or Muslim Wakf as mutually exclusive fact. It is not the case of defendant either that the property is a public trust amounting to a Muslim Wakf. Had that been the case, the fact of existence of public trust

being admitted, there would have been no issue to that effect to be tried between the parties.

45. As a matter of fact in all cases filed in courts the primary question that arises is whether party has the right claimed. If the plaintiff fails to establish that he has got such right, suit must fail at that.

46. The same result must follow where the enquiry into right claimed is excluded from jurisdiction of civil courts through statutory provision whether explicitly or by necessary implication. As I have reached conclusion that claim to right founded on existence of property as public trust property to which such right is claimed, the issue having not already been determined and attained finality and conclusiveness under the provisions of Bombay Public Trust Act, 1950, it could not have been determined by civil court, and has been so held by both the courts below, the resultant position is that plaintiff could not in these proceedings establish his claim to the right, for determination of such right, jurisdiction vest in authorities under Bombay Public Trust Act, 1950 with Asst. Charity Commissioner or Deputy Charity Commissioner and would be brought to civil courts only in the manner provided therein. In the absence of such determination of claim of plaintiffs by competent authority having jurisdiction, the inability of plaintiff to establish his claim to the right must lead to logical consequence of dismissal of suit, leaving the plaintiff to get his right to claim determined by appropriate authority before approaching civil court for remedy for the breach complained.

47. To the same conclusion indicate provisions of Order XIV, Rule 2 of C.P.C. While sub rule 1 mandates that a trial court decides all issues, sub rule (2) envisages an exception that where court is of the opinion that the case or any part thereof may be disposed of on an issue of law only it may try that issue first where issue relates to the jurisdiction of court or a bar to the suit created by any law for the time being in force, it may postpone settlement of other issue until decision of such issue and then deal with the suit in accordance with decision of such issue.

48. Present was a case of such nature, where the court ought to have determined the issue, whether question as to the plaintiffs' claim to right in the suit could be tried and determined by civil court, rather than side tracking it by not deciding the same, and trying the suit on assuming such right to exist and grant the

ultimate relief claimed on that basis without determining the existence of right itself on which parties have joined issue. This has clearly led to an error on the part of both the courts below in granting relief to a suitor without adjudicating upon the existence of right claimed by the plaintiffs, when in ordinary case on non determination of such issue, the suit could not have proceeded at all. It may be noticed that for deciding whether court has jurisdiction to try issue No. 9 and if answer be in negative what is its effect on suit, no evidence was required to be taken. It was a pure question of law. It related to jurisdiction of court to entertain enquiry about the very existence of plaintiffs right under the provision of Bombay Public Trust Act, 1950.

49. In view of my aforesaid conclusion the appeal must succeed. However, before parting with it, I may notice that learned counsel for the respondent plaintiff argued that both the courts below have come to concurrent finding that property in question was being used for providing shelter or abode to any visitor without distinction of caste or creed and this finding alone is sufficient to negative the contention of respondents about existence of a Muslim Wakf and consequently entitling the plaintiffs to claim relief for declaring the publication of list dated 6.5.1965 to be illegal and void and that the property in question is not a Muslim Wakf. This is so according to learned counsel because if beneficiary of an amenity includes anybody other than Muslim, it can be anything but a Muslim Wakf. It may be a public charity or a public trust, but beneficiary if includes non Muslim it becomes of secular character which is not envisaged object of a Muslim Wakf. Reference was made to decision of Supreme Court in Nawab Zain Yau Jung and ors v. Director of Endowments and Anr. AIR 1963 SC 985 as well as Board of Muslim Wakf v. Radha Kishen AIR 1979 SC 289. This plea was raised apart from contending that respondents have failed to prove that property was dedicated by a Muslim and was so dedicated to almighty as to vest the same in Him. I am prima facie of the view that both the parties have laboured under common impression that if the muslims are only users of property it be treated as a Muslim Wakf and in the process necessary material in this regard for deciding the issue about existence of Wakf, if so, its nature and beneficiary who could claim right to its benefit had also not been brought on record.

50. Wakf has been defined under Section 3(1) of the Act of 1954 to mean permanent dedication by a person

professing Islam or any other person of any movable or immovable property for any purpose recognised by Muslim law as pious, religious or charitable and includes"

51. This definition does not appear to be deviation from what has been stated by the learned in Muslim law.

52. Mulla in his 'Principles of Mahamedan law' has defined Wakf to mean "the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable." - Para 173.

53. He has further stated "What is involved in creation of the Wakf is "the tying up of property in the ownership of God the Almighty and the devotion of the profit for the benefit of human beings"

54. Fyzee in his 'outlines of Mohammedan Law' referred to concept of Wakfs under Muslim Law by quoting from opinion of Ameer Ali in delivering judgment of Judicial Committee in Vidya Varuthi v. Babusami Aayyar (1921) 48 I.A. 302.: (AIR 1922 P.C. 122):

"But the Mahommedan Law relating to trust differs fundamentally from English Law. It owes its origin to a rule laid down by the prophet of Islam; and means 'the tying up of property in ownership of God the Almighty and devotion of the profits for the benefit of human beings"

55. Ameer Ali in his work on 'Mohemmadan Law' has classified Wakfs into 3 categories viz., Trusts for public utility which are dedicated to public at large called Public Wakfs, Trusts, the primary and initial object of which is partly to provide for a general pious purpose and partly for the benefit of particular individual or class of individuals, which may be settler's family are quasi public Wakf and lastly private Wakfs to make provision for private individuals. This view primarily discloses that in the class of public Wakfs or quasi public Wakfs, to the extent benefit is to reach public at large the beneficiary need not necessarily be a Muslim. This further gains support from definition of Wakf adopted by Ameer Ali, when he says, "Technically or as Arabian jurists put it "in the language of law it signifies the dedication or consecration of property either in express or by implication for any charitable purpose or religious object or to secure any benefit to human being. To use curt but expressive language of the Moslem Lawyers `a

dedication to any good purpose is a Wakf'.

56. In his opinion in Vaidya Varuthi's case (1922 P.C. 122) he succinctly put it:

"It owes its origin to a rule laid down by the prophet of Islam; and means 'the tying up the property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings. When once it is declared that a particular property is wakf, or any such expression is used as implies wakf that a dedication to pious or charitable purposes is meant, the right of the Wakf if is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of benefit."

57. The class of beneficiary of a particular trust must ordinarily depend upon the nature of object with which dedication has been consecrated by a Muslim to create any Wakf. Therefore, before finding answer to the question as to who are beneficiary of any particular Wakf, it may be necessary to find the object of the Wakf. This is also discernible from the definition of beneficiary of Wakf under the Act of 1954, which reads as under as on the date when present suit was filed:-

"3(a) "beneficiary" means a person or object for whose benefit a wakf is created and includes religious, pious and charitable objects and any other objects of public utility sanctioned by the Muslim law"

58. These authorities and statutory provision do suggest that subject to accord with Muslim law a Wakf can be created for three different objects, viz., religious, pious or charitable for the benefit of humanity and good purpose, and class of beneficiaries will have to be determined with reference to the object with which Wakf was consecrated.

59. Illustratively rest houses for ghazis or soldiers engaged in holy warfare or for pilgrimage are called rahats dedication for such object being religious the occupants beneficiary is only such class of persons. However, where rest house as a place of abode dedicated for use by general public as a pious or charitable purpose of public utility may not result in confining the beneficiary occupants to any specified class or community.

60. Likewise alms to poor has been recognised by Muslim Law to be a pious and charitable purpose. Now, prima facie there does not appear to be any authority to support the view that a property dedicated for distributing its income as alms to poor can be construed as Wakf only if alms is distributed to members of Muslim Community only. On the other hand, settling a trust for help all religious institutions, irrespective of whether it is a temple or mosque, though may be charitable and of a public utility in sectarian sense, since idolatry is prohibited by Muslim law, a charity in aid of such secular purpose being opposed to Muslim tenets cannot be construed a Wakf, though it may be a charitable public trust, as was the case in Nawab Zain Yar Jung's case.

61. The decisions in Nawab Zain Yar Jung (AIR 1963 SC 985) or other contemporary decisions containing observation that beneficiary must be a member of Muslim Community has to be read in the context of definition of beneficiary in Section 3(a) of the Act of 1954 as it stood. Until it is amended by the Wakf, (Amendment) Act, 1964 w.e.f. 10.10.1964 :

It reads:

"beneficiary means a person or object for whose benefit a Wakf is created and includes religious, pious and charitable object and any other object of public utility `established for the benefit of Muslim Community'."

It was this provision of beneficiary with which Supreme Court was dealing with in Nawab Zain Yar Jung's case. So also this was the provision under consideration before Madras High Court in Kassimiah Charities Rajagiri v. Madras State Wakf Board AIR 1964 Mad. 18. However, Section 3(a) was amended with effect from 10.10.1964 by substituting words `sanctioned by Muslim Law' in place of `established for the benefit of Muslim Community'. This omission of latter expression from the statute prima facie has some significance.

62. The issue of this nature was not directly in consideration in Radha Kishan's case as well.

63. In this light a musafirkhana, if its dedication is for a religious purpose like providing shelter to pilgrims or to those who are performing religious ceremonies sanctioned by Muslim Law, may perhaps can have

its beneficiaries only members of Muslim community. But if on the other hand if a property is dedicated as an amenity of general public utility or for charitable purpose to utilise its income for charitable purposes sanctioned by Muslim Law, use of such amenity may not militate against its being a Muslim Wakf. In other words unless it is made clear with what object property is dedicated, it may not be possible to decide the exact nature of dedication, even if it be presumed in favour of the appellants that it was after grant of land was made to Kamruddin, he constructed the house and that house is being used as Musafirkhana or Saraia Dharmshala, a place of abode for Wayfarers. Both parties, apparently having engrossed with user of property by Muslims only have not lead any evidence on this vital aspect about 'object of dedication of building' of the issue. In this connection, it may also be noticed that it is not a case of lost grant and user of property, since time immemorial but grant in specific manner has been the contention of both sides, and user from that period by general public or muslims. The pivot the object with which dedication and use was being made is missing. In this connection, it is also significant to notice that according to Bhagwadgomandal word 'Dharmshala' and 'Musafirkhana' have been defined to mean one and same thing. Nothing therefore may turn on the expression 'Dharmshala' in the letter of grant of land without something more. Nor actual user contrary to the object of actual dedication will affect the nature of grant, though in the absence of clear evidence about object, long user in one way or other may itself furnish some evidence of object.

64. Though prima facie it can be suggested that since land was granted by erstwhile ruler of the State to a Muslim for construction of 'Lokopayogi Dharmashala', suggesting that building was to be construed by grantee for public utility. Thereafter too vital information about fact whether there was in fact dedication of building by that grantee as to vest it in Almighty or he simpliciter discharged of his obligation as per the terms of grant is missing. It is only in the former case that dedication of a property to almighty for the object of making it available for use as public utility as public charity will invest the dedication with the character of Muslim Wakf for which vesting of the property in Almighty is a necessary ingredient. In latter case it may partake character of a sovereign grant for public amenity simpliciter.

65. Be that as it may that being only a prima facie view requiring more detailed consideration, when occasion

for such determination may arise. In view of my conclusion that the very issue about right of plaintiff to claim relief being beyond the jurisdiction of civil court the stage for considering this question concerning relief to be granted did not arise and I do not propose to answer these issues finally. The above discussion is with a view to point out the basic contours of enquiry required to be made for deciding issue about existence of a Muslim Wakf in the circumstances like the present one. I leave it at that. The stage will arise only after party raising this issue, is able to establish his right with reference to which he raises the issue.

66. Moreover, in view of the statements made by the appellants through their counsel Sarvshree S.M.Shah and C.H.Vohra that subject to availability of accommodation and Rule of business, plaintiffs as well as members of the general public, irrespective of caste or creed will be permitted to have accommodation as musafirs in the 'Musafirkhana' that may be run and a admission in the educational institution may be given to qualified students that may be run by the concerned appellants, no present cause of grievance survive. This statement was made without prejudice of rights of respective parties as to their contention about nature of the property in question on such issue being raised before appropriate authority in accordance with law.

67. With these precincts, this appeal is allowed. Judgments and decree passed by Courts below are set aside and plaintiffs suit is dismissed. Parties will bear their own costs throughout.

67. Before parting it is clarified that dismissal of the suit will not preclude the plaintiff from approaching competent authority for determining the question, which has been left undecided for want of jurisdiction and seek him remedies thereafter in accordance with law as are available to him, nor will the defendants be bound by any findings recorded against them in these proceedings as to nature of property, and its user.